



AF/3737

Docket No. T2315-906256

IN THE UNITED STATES PATENT & TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS & INTERFERENCES

Appellant: Frank J. Bova et al.

Serial No.: 09/430,034

: Art Unit: 3737

Filed: October 29, 1999

: Examiner: E. Mantis Mercader

For: Mask System and Method for
Stereotactic Radiotherapy and
Image Guided Procedures

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Hon. Commissioner of Patents & Trademarks
Washington, D.C. 20231

TECHNOLOGY CENTER R3700

Sir:

This is in response to the Examiner's Answer dated July 12, 2002

Claims 9, 15-16, 19 and 23 stand rejected under 35 U.S.C. 102 (b) as being
anticipated by Kormos et al.'890.

Claims 1-8, 10-14, 17-18, and 20-22 stand rejected under 35 U.S.C. 103(a) as being
unpatentable over Kormos et al.'890 in view of McLaurin '117.

The Examiner disagreed as to the interpretation given to the Kormos et al.'890
reference by appellants, stating:

"--The Examiner's position is that the Appellant fails to recognize
alternative embodiments disclosed in Kormos et al.'890. The one
embodiment, as correctly recognized by Appellant, refers to the
exoskeleton, which is affixed to the sides of the patient support (col. 3,
lines 12-16). There is, however, an alternative embodiment, disclosed by
Kormos et al.'890, one that Appellant fails to recognize. According to this
embodiment, as disclosed by Kormos et al.'890, the exoskeleton is a mesh
of a very stiff type material, so stiff that there is no need for affixation
means, and in fact it can be held in place, supported relative to itself,
allowing the exoskeleton to be mechanically free (col. 3, lines 23-26-
referring to the material being so stiff as to allow the tissue to be fixed
relative to itself, meaning without any need for affixation means to support
the exoskeleton)---" (Emphasis Examiner's).

Thus, the Examiner argues that Kormos teaches three different embodiments of the patented invention, two of which require affixation of the exoskeleton to the patient support or base material and one that does not. As basis for this interpretation, the Examiner points to the disclosure in Kormos at col. 3, lines 3-31. Appellants agree with the Examiner that Kormos et al.'890 makes distinctions as to the different types of material that can be used in the construction of the exoskeleton; one being "flexible and stretchable" (col. 3, lines 3-13), another being a plaster impregnated gauze type material, and the third being a mesh of a very stiff but pliable elastic mesh which is sufficiently stiff to hold the soft tissue substantially fixed relative to itself (col. 3, lines 20-23).

The Examiner contends that, since Kormos does not specifically state in lines 24-27 of Col. 3 that the third embodiment of exoskeleton is affixed to the patient support and does so specifically state in connection with the first two embodiments, Kormos therefore anticipates the claimed "mechanically-free" exoskeleton. In other words, according to the Examiner, since Kormos did not specifically state that the third embodiment was affixed to the patient support but did state that the first two embodiments were so affixed, the reference necessarily or inherently discloses a "mechanically-free" exoskeleton. Thus, the Examiner states in the paragraph bridging pages 5 and 6 of the Answer with respect to the three different embodiments:

"--- In contrast with the previous sentences wherein the material used was stated to be of a flexible sheet type material or of a material type such as plaster impregnated gauze, both of which would be affixed to a table or support, here (the third embodiment) the material is stated to be of a very stiff nature holding the tissue substantially fixed relative to itself, meaning without any need for affixation means and hence allowing the very stiff exoskeleton to be mechanically free---" (emphasis added).

It is interesting to note that the Examiner accuses appellants of a selective interpretation of Kormos in arguing that the reference requires mechanical affixation of the exoskeleton to the patient support and yet supplies to the disclosure of Kormos the emphasized statement in the above-quoted statement from the Answer necessary to support her position. Nowhere in the disclosure of Kormos is there a statement or suggestion that the exoskeleton is "mechanically-free". This is a conclusion that the Examiner has extrapolated from her own interpretation of the language employed in lines 24-27 of Col. 3; an interpretation wholly at odds with and contradictory of the remainder of the disclosure of Kormos.

A careful examination of the disclosure of Kormos, however, will reveal that it is the Examiner and not appellants who is guilty of "selective interpretation".

Thus, note that Kormos only sets forth three different embodiments of exoskeleton materials of construction of the exoskeleton, not different embodiments of how the exoskeleton is intended to be employed in the practice of the invention. It is the Examiner who has contorted the clear teachings of Kormos to read into the disclosure thereof that the reference teaches a "mechanically-free" exoskeleton. In the summary of the invention, Kormos states that the exoskeleton is "adhered to a base structure". In col. 3, lines 4-16, the exoskeleton is identified in the only drawings of the disclosed system as element 12 and that it is affixed to either the patient support or a base 16 by affixing means 14. At column 3, lines 46-50, following the description of the three different embodiments of exoskeleton material referred to by the Examiner, Kormos states that:

"---Once the fiducials are secured (to the exoskeleton), such as with an adhesive, the patient support, patient, and exoskeleton are moved into a magnetic resonance imaging system---" (emphasis added)

If it is true, as argued by the Examiner, that Kormos contemplates a “mechanically-free” exoskeleton, why would the reference require removal of patient, exoskeleton and support into the imaging system?

It is clear that the Examiner has read into Kormos a tortured and convoluted interpretation of the teachings therein so as to read it on the appealed claims. Such is clear from the Examiner’s own statement quoted above in describing the so-called “third embodiment of Kormos, wherein she states: “meaning without any need for affixation means and hence allowing the very stiff exoskeleton to be mechanically free---” (emphasis added), thereby putting words in Kormos’s mouth. It is respectfully submitted that the Examiner is substituting her own teachings for those of Kormos. It is clear that Kormos never intended to define or suggest a system wherein the exoskeleton is not affixed to a base support. The mere fact that Kormos neglected to mention such affixation when describing the third embodiment of material of construction of the exoskeleton is not tantamount to a teaching of a “mechanically-free” exoskeleton; particularly where the reference clearly shows such affixation in all of the drawings and other descriptions of the actual use of the exoskeleton.

It may or may not be true that the “third embodiment” does not “require” or “need” affixation; however, such is clearly not the teaching of the reference. Rather, the reference clearly indicates in every description of the method of the patented invention that the exoskeleton is affixed to the patient support. It is axiomatic that an Examiner may not substitute his or her own conceptions of an invention for those of a patentee. The Examiner is not aware of the exact composition of the ‘third embodiment’ described by Kormos other than that it is “a very stiff but pliable elastic mesh”. No specific details of the material of construction are provided by Kormos. How can the Examiner construe this single vague definition into one of a “mechanically-free” exoskeleton? The totality of the remainder of the

disclosure of Kormos is that the exoskeleton, regardless of the material of construction, must be affixed to the patient support.

Respectfully submitted,

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Filed: August 9, 2002

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